TRANSCRIPT OF PROCEEDINGS

NO. B-804354

COURT OF COMMON PLEAS

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THE COURT: I agree. If there's no further argument, the initial intrusion was lawful because the officer was armed with a search warrant to search the premises for the parts of the backhoe. He discovered these vehicles inadvertently. He wasn't looking for stolen vehicles. He was looking for stolen backhoe, or parts. And the unlawfulness of the operation was apparent, to quote the Officer McGaha, who I think would qualify as an expert in these matters, having served a number of years in the auto larceny department of the Hamilton County Sheriff's Office. He said the totality of the operation

indicated a chop shop. So therefore I believe that this case does fall under the plain view doctrine. And in light of the, the affidavit that is contained in the search warrant, that it is known by me -- I'm quoting, it is known by me that this subject has been convicted of receiving stolen property, auto and trucks, in the past and is now on probation.

I'm not so sure but what that statement in the affidavit doesn't broaden the authority of the search warrant enough to justify the search with the warrant.

However, I don't believe the warrant was necessary. I believe this falls under the plain view doctrine, therefore, the motion to suppress will be overruled.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	NO. C 810078
Plaintiff-Appellee,	:	
vs.	:	OPINION.
EDWARD J. BOLL, JR.,	:	
Defendant-Appellant,	:	

APPEAL FROM THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Messrs. Simon L. Leis, Jr., William E. Breyer and Thomas Sperber, 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. David N. Parker, 1212 Tri-State Building, 432 Walnut Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PALMER, P. J.

This matter concerns, in the first instance, the uncommon circumstance of an affidavit in support of a search warrant which contains two separate levels

of hearsay from informants and presents the question, among others, of whether the standards set forth in Aguilar v. Texas (1964), 378 U.S. 108, 84 S. Ct. 1509, and Spinelli v. United States (1969), 393 U. S. 410, 89 S. Ct. 585, are to be applied to both levels of hearsay. Additionally, this cause requires us to answer the question of whether, under the circumstances, the doctrine of "plain view" may be held to apply so as to validate the warrantless seizure of certain items from defendant's premises. For the reasons contained herein, we answer both questions in the affirmative and uphold the judgment below.

Defendant-appellant, Edward J. Boll, Jr., was arrested and charged with four counts of receiving stolen

property, in violation of R. C. 2913.51, and a single count of possession of criminal tools, in violation of R. C. 2923.24. These charges resulted from the execution of a search warrant directed against defendant's premises which uncovered the presence of several stolen vehicles and other contraband, which evidence served as the fundament for the instant charges. Defendant entered a plea of not guilty to the charges and filed a motion to suppress the evidence seized during the search on the grounds that the search of his property and the seizure of the goods violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. Following the denial of his motion by the trial court, defendant

withdrew his plea of not guilty and entered a plea of no contest to the charges, subsequent to which he was found guilty and sentenced as appears of record. From this conviction and sentence, defendant has taken this timely appeal in which he asserts that the trial court erred in overruling his motion to suppress the evidence on the dual grounds that: (i) the affidavit underlying the search warrant fails to establish probable cause; and (ii) the executing officers overstepped their constitutional authority because the property seized during the search was not described in the warrant.

I.

Defendant's first challenge to the conviction concerns the issuance of the

search warrant based upon an affidavit which provided in pertinent part that:

> William McGaha, Hamilton County Sheriff's Patrol, being first duly cautioned and sworn, deposes and says that within the jurisdiction of Hamilton County Municipal Court at 8709 Bridgetown Rd., he believes and has good cause to believe that at said place is concealed a case 480 back hoe loader const. king, yellow in color, or parts thereof, and that said items are concealed in violation of law, to wit: 2913.51 R. C. Receiving stolen property, value over $150.00.

Such belief is supported by the following facts: Information given to me by Edward Bedel, owner-operator of the Bridgetown Tool Rental. That located at the above address is located the back hoe, or parts thereof. This information was given to him by a subject that saw these items on Tuesday, 10/7/80. The informant described the back hoe assembly to Mr. Bedel

as follows: The part was yellow and had stickers removed that are the exact size used by the Tool Rental, also the serial numbers have been ground off. He also described the size (480) of which there are only seven of this size in Cincinnati and Mr. Bedel owns four of these. It is known to me that this subject has been convicted of receivng stolen property (autos and trucks) in the past and is now on probation. Mr. Bedel has personally appeared before the issuing Judge and has sworn to these facts. (Sworn and questioned by me. Rosen, J. 10/10/80.)

On 5/20/79 Mr. Bedel made a theft report to Green Township Police reference the case back hoe loader

serial #8956809, Eng. 281-7457.

Affiant further says that there is not urgent necessity that the search be conducted in the nightime . . . .

On the basis of this affidavit, a search warrant was issued and a search subsequently executed that afternoon. It is defendant's contention that the affidavit is insufficient to supply the constitutionally required probable cause and, hence, the search warrant is fatally defective.

Specifically, defendant asserts that while search warrants may be predicated upon affidavits containing hearsay statements, i. e., unsworn statements of out-of-court declarants offered for their substantive truth, Jones v. United States (1960), 362 U.

S. 257; Draper v. United States (1959), 358 U. S. 307; State v. Gill (1977), 49 Ohio St. 2d 177, 360 N.E.2d 693, this affidavit contains hearsay based upon hearsay, and is thus wholly insufficent for the purposes of underpinning a search warrant. In the instant case, the affiant, Officer McGaha, obtained his information from a named informant, Mr. Bedel, who in turn obtained his information from an unknown source. Defendant argues that where the informant, Mr. Bedel, must rely for his factual conclusions on the unsworn statements of an unknown source, whose reliability is not attested to, the information contained in the affidavit does not pass muster under the guidelines first set forth in Aguilar v. Texas and explicated in

Spinelli v. United States. In essence, defendant argues that the affidavit did not permit a neutral and detached magistrate to make an objective determination of the reliability of the information or the credibility of the source contained therein, unlawfully supplanting this requirement with the judgment of the affiant. The issue thus posed is, in the context of the instant affidavit, both complex and searching. It is further, in principal part, a matter of initial impression in this jurisdiction. Those considerations seem to us to justify an examination of first principles at somewhat greater length than usual.

A.

It is well-established that while search warrants may not be issued

except upon a showing of "probable cause" under the Fourth Amendment, a magistrate, in discharging his obligation to conduct an independent assessment of probable cause, may rely upon hearsay information received by an affiant from an informant, ". . . so long as a substantial basis for crediting the hearsay is presented." Jones, supra at 269, 80 S. Ct. at 735. See also United States v. Wasserstrom (6th Cir. 1978), 571 F.2d 351; United States v. Dudek (6th Cir. 1977), 560 F.2d 1288, cert. denied, 434 U. S. 1037, 98 S. Ct. 774; State v. Roberts (1980), 62 Ohio St. 2d 170, 405 N.E.2d 247. While an affidavit does not pass constitutional muster which recites merely an affiant's belief that cause to search exists with out setting forth

the facts substantiating that belief, e.g., Franks v. Delaware (1978), 438 U.S. 154, 98 S. Ct. 2674; Nathanson v. United States, 290 U.S. 41, 54 S. Ct. 11, the rule validating such beliefs where grounded upon appropriately substantiated hearsay information is consistent with the distinction to be drawn between the quantum of evidence necessary for a criminal conviction and that lesser quantum required to establish "probable cause." Since the standards of proof are different, as well as the tribunals which determine them, there is a difference in the modes of proof to establish them. United States v. Ventresca (1965), 380 U.S. 102, 104-05, 85 S. Ct. 741, 745 (citing Brinegar v. United States (1949), 388 U.S. 160, 69 S. Ct. 1302). In this

context, the use of hearsay information in affidavits supporting search warrants offends neither the substantive nor proecedural rights of subject individuals, since it represents a legitimate mode of proof in establishing whether, to a reasonable person, facts exist to justify a conclusion that certain items to be seized are located on the property to be searched. Carroll v. United States (1925) 267 U.S. 132, 162, 45 S. Ct. 280, 288 (probable cause exists where ". . . the facts and circumstances within their (officers') knowledge and of which they had reasonably trustworthy information (are) . . . sufficient in themselves to warrant a man of reasonable caution in the belief that . . . an offense has been or is being commited.").

Nevertheless, since hearsay information, by its very nature, is inherently untrustworthy, the Supreme Court has developed specific rules governing the analytic processes of magistrates empowered to issue search warrants. In Aguilar v. Texas, supra at 114-15 84 S. Ct. at 1514, the Court held that while the identity of an unnamed police informant need not be disclosed, a magistrate is nevertheless permitted to find a "substantial basis for crediting the hearsay" contained in the affidavit where, from the face of the affidavit, the magistrate has been informed of: (i) some of the underlying factual circumstances upon which the informant's conclusion was based; and, further, (ii) some of the underlying circumstances from which the affiant con-

cluded that the unnamed informant was credible or his information reliable on this occasion. Crim. R. 41(c). Where either element is utterly wanting, a magistrate is not justified in issuing the search warrant, since to do so would in effect permit the requisite inference to be drawn not by a neutral and detached judicial officer, but either by a police officer "engaged in the often competitive enterprise of ferreting out crime," Johnson v. United States (1948), 333 U. S. 10, 14, 68 S. Ct. 267, 269, or by the informant himself. Aguilar, supra; Giordenello v. United States (1958), 357 U.S. 480, 486, 78, S. Ct. 1245, 1250. See Rugendorf v. United States (1964), 376 U. S. 528, 84 S. Ct. 825.

The fact that one or the other ele-

ment required by Aguilar is not specifically articulated in the affidavit, however, will not in itself defeat the validity of the resultant search warrant. Where such is the case, the other allegations in the affidavit which corroborate the hearsay report must be considered, and the affidavit may nevertheless be deemed sufficient if it can fairly be said that the informant's tip, ". . . when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's tests without independent corroboration." Spinelli, supra at 415, 89 S. Ct. at 588. Where the affiant merely swears that his informant was reliable and offers no factual detail in support of this conclusion, the magistrate is

further directed to review the entire affidavit in an effort to glean sufficient independent corroboration of the Aguilar elements. If such corroboration is not forthcoming, the affidavit is constitutionally infirm.

The Aguilar-Spinelli test thus contemplates that judicial review of affidavits in support of search warrants will be conducted in a "common sense and realistic fashion," in which the "(t)echnical requirements of elaborate specificity once exacted under common law pleadings" are relaxed, without infringing the guarantee that no warrant shall issue but upon probable cause. Ventresca, supra 108, 85 S. Ct. at 746. See also Spinelli, supra at 438, 89 S. Ct. at 600 (An officer's affidavit ". . . should not be judged as an entry in

an essay contest.") (Fortas, J., dissenting). The entire affidavit must be examined in an effort to determine whether the affiant has presented the magistrate with facts not only demonstrating the informant's basis for knowledge that contraband items are to be found on certain premises, but also facts demonstrating either the informant's inherent credibility or his reliability on a particular occasion.

Thus, where the affidavit does not contain specific factual allegations to the effect that the informant's knowledge of criminal activity is based upon first-hand observation, this element of the Aguilar standard may nevertheless be inferred under Spinelli where the affidavit contains such a detailed description of the contraband

to be seized that first-hand observation may be inferred, e.g., United States v. Dudek, supra; United States v. Toral (9th Cir. 1976), 36 F.2d 893; United States v. Nasse (7th Cir. 1970), 432 F.2d 1293, cert. denied sub nom. Tocco v. United States, 401 U.S. 938, 91 S. Ct. 927, State v. Fisher (1st Dist. 1977), 52 Ohio App. 2d 53, 368 N.E.2d 332.[1]

Similarly, where the affidavit is devoid of any specific allegation that the information is either credible[2] or that his information on a particular occasion is reliable,[3] this element of Aguilar may be inferred where the informant is a named private citizen rather than a paid police informant, e.g. United States v. Unger (7th Cir. 1972), 496 F.2d 1283, cert. denied, 411

U. S. 920, 93 S. Ct. 1546; United States v. LaFond (D.C. Wis. 1980), 482 F. Supp. 1379, or where he is the victim of the alleged criminal activity, e.g., United States v. Federbush (9th Cir. 1980), 625 F.2d 246; United States v. Humley (8th Cir. 1977), 567 F.2d 822.

Equally significant to the instant case, it has been held that where the information supplied by an unnamed informant is consistent with a reputation for a certain kind of criminal conduct by the subject of the search, and such reputation is supported by prior convictions and arrests, the element of reliability may be inferred. E.g., United States v. Burns (10th Cir. 1980), 624 F.2d 95, cert. denied sub nom. Reynolds v.

United States, 101 S. Ct. 361; United States v. Afanador (5th Cir. 1978), 567 F.2d 1325; United States v. McNally (3d Cir. 1973), 474 F.2d 934. This is not to suggest that generalized allegations concerning an individual's unsavory reputation, when combined with detailed information, is sufficient to establish an informant's reliability, since unsupported rumor to such effect does nothing to enhance the reliability factor of the Aguilar quotient. E.g., United States v. Smaldone (10th Cir. 1973), 485 F.2d 1333; State v. Gill, supra. Where, however, allegations of an individual's reputation for specific criminal activity is substantiated by such objective indicia as prior arrests or specific knowledge of police officers, Spinelli does not preclude

consideration of such averments for the purposes of inferring an informant's reliability. See Jones v. United States, supra; Burns, supra. See also United States, ex rel. Cunningham, v. Cuyler (D.C. Pa. 1979), 479 F. supp. 765. See generally 1 W. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.2 (d) (1978). Since an individual's reputation, when coupled with more detailed factual allegations of illicit behavior consistent with that reputation, is probative of whether that individual acted accordingly in a particular situation, we can conceive of no reason for precluding a magistrate from considering such allegations in determining whether probable cause to search is present, so long as the reputation allegation is supported

by objective evidence of past conduct.[4]

From the foregoing discussion, it is clear to us that where an affidavit in support of a search warrant which contains hearsay is lacking either the factual basis or credibility elements of Aguilar on its face, Spinelli demands that the magistrate further consider the other factual allegations contained therein in an effort to determine whether the deficiency may nonetheless be inferred, and that these Aguilar elements may be inferred from a variety of facts. It does not therefore suffice to argue that simply because an affidavit does not expressly articulate the twin elements of Aguilar-Spinelli and Crim. R. 41 (c), the search warrant is necessarily infirm. The totality of the affidavit must be considered.

B.

Having determined the permissible scope of the inquiry into the reliability of hearsay information, the next issue presented by the instant affidavit concerns the effect, if any, of the use of two hearsay informants, the second informant building on the first, and the affiant on both. At the outset, we note that neither party to this action has directed our attention to any case within this jurisdiction dealing with the issue of double hearsay in affidavits, and our research has similarly uncovered none. While this presents an issue of first impression within this jurisdiction, however, several federal circuits and other state courts have had occasion to rule on the question.

The general approach of these authorities to the issue is that where the affidavit discloses that the source of an informant's information is not his own personal knowledge, but rather is hearsay to him and hearsay upon hearsay to the affiant, it does not necessarily follow that such information need be rejected out of hand by the magistrate. Since the ultimate question in every such case is whether the affiant has stated probable cause for believing that the items sought to be seized are located on the property to be searched, and since this requirement may be fulfilled where the affiant has gained his knowledge from an informant under Aguilar-Spinelli, the fact that the affiant's knowlede may be the result of double or multiple levels of

hearsay does not, per se, invalidate the resulting search warrant. United States v. Jenkins (6th Cir. 1975), 525 F.2d 819; United States v. Welebir (4th Cir. 1974), 480 F.2d 346; United States v. Wilson (7th Cir. 1973), 479 F.2d 936. See generally 1 W. LaFave, SEARCH AND SEIZURE, supra, § 3.3 at 541-44. Rather than the magistrate categorically rejecting this information, he must evaluate it along with all the other information in order to determine whether it can reasonably be inferred "... that the informant gathered his information in a reliable way." Spinelli, supra. So much seems to be clear.

The critical question upon which the authorities seem to divide is not the foregoing, but whether each level

of hearsay in an affidavit must pass muster under Aguilar-Spinelli or, in the alternative, whether the magistrate need focus only upon the affiant's informant and determine whether that individual may be held to be possessed of probable cause to search. Compare United States v. Skramstad (8th Cir. 1981), 649 F.2d 1259, 1263; Welebir, supra at 349, n.2; United States v. Carmichael (7th Cir. 1973), 489 F.2d 983, 986-87; Wilson, supra at 941 (each holding that hearsay based upon hearsay is acceptable as long as both levels meet the test of Aguilar-Spinelli) with United States v. Bush (2d Cir. 1981), 647 F.2d 357, 362-65; United States v. McCoy (10th Cir. 1973), 478 F.2d 176, 179; United States v. Fiorella (2d Cir. 1922), 468 F.2d 688, 691; United States

v. Bell (5th Cir. 1972), 457 F.2d 1231, 1234 (each holding that probable cause exists despite double hearsay where evidence of veracity and basis of knowledge coincide in at least one person). See also Jenkins, supra at 822-24 (asserting that both levels need not necessarily meet the Aguilar-Spinelli tests; however, under facts present there, both sources nevertheless did). Admittedly, the distinction between these different tracks of analysis is subtle, and often times it is difficult to discern precisely which analysis is being employed in a particular case. Suffice it to say, however, that where the latter analysis is employed, the danger that an informant or unnamed source may in fact draw the inferences of veracity and basis of knowledge

normally required of a neutral magistrate are arguably enhanced, and, therefore, less constitutionally desireable.

Since we conceive ourselves free to do so, we hold that where an affidavit in support of a search warrant contains multiple levels of hearsay, a magistrate is not justified in issuing a warrant unless it may be determined from the information contained in the affidavit that each level of hearsay meets the dual standard of Aguilar-Spinelli.

While we remain cognizant of the admonition contained in Ventresca, supra at 108-09, 85 S. Ct. at 746 to the effect that such affidavits are to be reviewed". . . in a commonsense and realistic fashion," and that "technical

requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area," the fact remains that to require anything less would, in our judgment, heighten the chances that official intrusions may occur on the basis of mere rumor or speculation circulating throughout the criminal underworld or corner alehouse rather than a reasonable suspicion that the property to be seized is located on the premises to be searched.

C.

Applying these principles, then, to the facts of the instant case, we conclude that the instant affidavit is sufficient,

marginally, to establish probable cause under Aguilar-Spinelli and Crim. R.

41(C). From the face of the affidavit, it can be established that the affiant, Officer McGaha, received his information from one Edward Bedel, a private citizen and owner of a tool rental company who in turn received his information from an unidentified source. Bedel himself never saw the backhoe after it passed out of his hands. The affidavit is entirely silent as to the status of the original source of information, and we categorically reject the notion, asserted by the State, that this source may be assumed to be a private citizen.[5] (Brief for Appellee at 6-7.) Bedel's source nevertheless provided him with a considerable degree of detail concerning the backhoe, detail which would support an inference that this indivdiual could only have

obtained the information from first-hand observation.

Thus, we are presented with an affidavit which, on its face, suggests that while Bedel may be held to be reliable under Aguilar, since he is a named private citizen who came forward with evidence of a crime, he must, however, rely upon information received from an unidentified informant for his basis of knowledge. Conversely, while the detail supplied by the unnamed source supports the inference that he had a sufficient basis for knowledge under Aguilar, the reliability of this source may not depend upon Bedel's status as a private citizen. Rather, if the unnamed source is to be held reliable under Aguilar, it must be on the basis of some legitimate inference drawn from

the allegations in the affidavit under Spinelli. See Part IA, supra.

A review of the affidavit convinces us that there exists sufficient indicia of this source's reliability to satisfy the requirements of Aguilar. This source provided detailed information about a backhoe which was the same model as one owned by Bedel (and reported stolen), of which there were only seven such models in the county. While this information alone is perhaps not sufficient to satisfy the veracity prong of Aguilar, it becomes so when coupled with the affiant's allegation concerning defendant's reputation, a reputation substantiated by a prior conviction for receiving stolen cars and trucks and current probationary status for that offense. This reliability

factor is buttressed by coincidence of this source's information with the independent police report that just such a piece of machinery was reported stolen. As such, the unnamed source of Bedel's information may be held to satisfy the requirements of Aguilar-Spinelli since both his basis for knowledge and his reliability on this occasion may be inferred from the language of the affidavit.

Having so concluded, we further hold that Bedel's information met the Aguilar-Spinelli tests since the veracity element may be inferred from the fact that he is a named private citizen as well as the victim of the alleged crime and, incidental to our conclusion above, the factual basis element is satisfied by the information he was

entitled to credit and to receive from the unnamed source. As such, both levels of hearsay could be considered under Aguilar-Spinelli and the magistrate was justified in issuing a search warrant based upon the above-described information delivered by the affiant.[6] Accordingly, the motion to suppress the evidence seized during the execution of the search warrant on the grounds that probable cause was lacking was properly denied. The first assignment of error is therefore overruled.

II.

In his second assignment of error, defendant contends that the trial court erred in not suppressing the evidence seized during execution of the search warrant for his premises on the grounds that the seizure exceeded the scope of

the warrant since the items confiscated were not listed in the warrant and no recognized exception to the warrant requirement for all seizures exists to permit their introduction at trial. It is undisputed that the items seized, four cars and a set of tools, were not contained in the search warrant and that the item actually being sought, the backhoe, was never found on the premises. The State contends that although the backhoe was never discovered, the other property thought to be stolen was found inadvertently by police whose presence on the premises was lawful and, hence properly seized pursuant to the "plain view" exception to the general Fourth Amendment requirement of antecedent warrants. Defendant, on the other hand, does not

dispute the State's contentions that the officers had a right to be on the premises and that the discovery of the cars and tools was inadvertent, but rather contends that since the incriminating nature of the items was not "immediately apparent" to the police, the plain view doctrine is of no avail in validating an otherwise unlawful search, citing as support for this proposition the recent case of State v. Williams (1978), 55 Ohio St. 2d 82, 377 N.E.2d 1013. Under the facts of this case, we conclude that defendent's contentions in this regard are not well-taken.

A.

The evidence adduced at the motion to suppress reveals that when Officer McGaha entered upon the premises and

displayed the search warrant to defendant's wife, he proceeded toward the back of the home to the garage area underneath the house. Upon entering the garage, McGaha discovered two vehicles in partially-stripped condition, and various car parts and related tools strewn about the area. (T.p. 45-46.) To McGaha, an officer with several years of experience investigating auto thefts, the scene was instantly recognizable as a setting for illegal activity:

> PROSECUTOR: Now, with regard to the other items that are indicated on the return of the search warrant, could you explain why you obtained those items?
>
> McGAHA: The tool boxes, the torch set, the air compressor, the slam hammer and the craftsman electric wrench were all taken, as I felt they were used in a chop shop operation and were therefore criminal tools.

(T.p. 50-51.) McGaha then proceeded to note the vehicle identification number of each automobile in the garage and, upon receiving a radio report from a fellow officer at the police station, confirmed that these two cars were, in fact, stolen. (T.p. 47, 51.) These two cars and the tools were then seized. Thereafter, McGaha and his fellow officers discovered approximately twenty other vehicles, in various stages of disrepair, scattered over the property, some in other buildings, some resting in open fields. McGaha took down the identification number of each vehicle and relayed it to the police station, where a computer check was immediatley run on each such number. After receiving confirmation that another two of the remaining cars had

been reported stolen, McGaha seized those vehicles. (T.p. 46-49.)

On cross-examination, McGaha admitted that none of the car parts or tools resembled the backhoe or any of its parts and, further, that the cars and car parts, if viewed separately, could not be confirmed as stolen property.

Q. Officer McGaha, it would be safe to say that when you look at a, an object like this, like a part, and what occurred on that day was you had, based on your observations, you had a suspicion that this might be a stolen part, or parts thereof and then you acted upon that intuition; isn't that correct?

A. Well, the serial number on the vehicle came back as stolen and those were the parts, same color that matched those vehicles, so we took those as parts of the similar vehicle.

Q. But basically you went into the area looking for a backhoe and then you had a suspicion that the cars in question

might have been stolen cars, so you acted on that intuition; isn't that correct?

A. Based on past experience with Mr. Boll, yes.

Q. O.K. Specifically, sir, when you looked at the cars, there were only four that you took off the premises; isn't that so?

A. That's correct.

Q. There were some items, there were some cars on that property that certainly were not stolen; isn't that correct, to the best of your knowledge?

A. That's correct, to the best of my knowledge.

* * * * *

Q. But as you look at a part of a vehicle, there's nothing intrinsic in that vehicle, just the item itself, which makes it incriminating; isn't that correct?

* * * * *

A. Well, looking at any vehicle sitting on the street, it's in itself sitting there, you

wouldn't notice anything incriminating about it. But further investigation and past experience and five years as an auto theft investigator, or working in chop shop operations, I felt that those parts were stolen, as they matched exact same color and they looked like they were removed from the Volkswagen, stripped.

Q. My question to you specifically is, there is nothing about the item itself which is incriminating in nature such as heroin or marijuana?

* * * * *

A. Not that particular item.

Q. Or in State's Exhibit Number 7, the part, there's nothing -- the parts thereof, there's nothing incriminating about the parts?

A. Not the two fenders, no.

Q. Or anything else contained in this State's Exhibit 7.

A. That's true.

Q. The parts.

A. (Nodding)

Q. Or in State's Exhibit Number 10, there's nothing in itself that makes that particular part incriminating by its very nature?

A. Well, you know, I can't really answer -- I know what you want me to say and I can't really agree with what you want me to say because I know from looking at the color and those parts, and those exact parts were taken out of the stolen vehicles. So they have to be the parts that belong to that vehicle, so they would be stolen.

Q. But as you look at them by themselves, just looking at them without doing anything else, there's nothing by their very nature that is incriminating? This is State's Exhibit Number 10.

A. No, not those particular parts.

(T.p. 54-58.) On redirect examination by the State, McGaha nevertheless asserted that while one could not confirm the criminal nature of each car

part or tool, when viewed independently as separate exhibits, he could reasonably have drawn the conclusion from the entire scene that the various parts were removed from the cars and that, based upon his experience, the operation was a "chop shop." (T.p. 58.)

It is defendant's position that this testimony reveals that the criminal nature of the evidence was not "immediately apparent" to the officer, since it is clear that confirmation of its status as contraband did not occur until the officer received a computer check from the station after calling in all the identification numbers. Hence, argues defendant, the items seized as a result of this warrantless search may not be admitted under the "plain view" exception detailed in State v. Williams.

B.

At the outset, we note that despite the fact that the officers were present on the premises pursuant to a lawfully issued search warrant, see Part I, supra, the items eventually seized were not listed in the warrant, or any reasonable interpretation of the descriptive language contained therein, and consequently the seizure must be held to have been executed without a warrant. Where a search and seizure occurs in the absence of a valid warrant, the official intrusion is presumed to be unconstitutional under the Fourth and Fourteenth Amendments, e.g., Terry v. Ohio (1968), 392 U.S. 1, 88 S. Ct. 1868; State v. Kessler (1978), 53 Ohio St. 2d 204, 373 N.E.2d 1252; State v. Morris (1975), 42 Ohio St. 2d 307,

329 N.E. 2d 85, cert. denied sub nom. McSpadden v. Ohio (1976), 423 U.S. 1049, 96 S. Ct. 774, and, absent some exception to the rule requiring an antecedent warrant, any evidence obtained as a result of that unlawful conduct must be suppressed. Ker v. California (1963), 374 U.S. 23, 83 S. Ct. 1623; Mapp v. Ohio (1961), 367 U.S. 643, 81 S. Ct. 1684. Moreover, the State bears a heavy burden in coming forward with evidence of sufficient quantity and quality demonstrating the existence of a recognized exception which would excuse the otherwise unlawful intrusion and permit introduction of evidence seized as a result thereof. Kessler, supra; State v. Call (2d Dist. 1965), 8 Ohio App. 2d 277, 220 N.E. 2d130. See United States v.

Jeffers (1951), 342 U.S. 48, 72 S. Ct. 93; McDonald v. United States (1948), 335 U.S. 451, 69 S. Ct. 191. Thus, unless the State can demonstrate that the articles were in "plain view", the arguably relevant exception in this case, the evidence seized should have been suppressed.

It is a well-established proposition that when in the course of a lawful search a police officer happens upon a suspicious object, he is entitled to inspect it and, if it consists of fruits, instrumentalities or evidence of crime, to seize it, even though the crime is not that which occasioned the search. Gustafson v. Florida (1973), 414 U.S. 260, 94 S. Ct. 488; United States v. Robinson (1973), 414 U.S. 218, 94 S. Ct. 467; Abel v. United

States, (1960), 362 U.S. 217, 80 S. Ct. 683. This generalized statement of the rule permits, under limited circumstances, the seizure of both contraband (i.e., items intrinsically incapable of lawful possession) and items which are not themselves prohibited, but which are "evidence of crime." However, in the case of seizing evidence of a crime, the Supreme Court, isupholding the search of a suspect's washing machine and the seizure of clothes contained therein, noted:

> The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for "mere evidence" or for fruits, instrumentalities or contraband. There must, of --course, be a nexus --automatically provided in the case of fruits, instrumentalities or contraband -- between the item to be seized and criminal behavior. Thus in the case of "mere evi-

> dence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required.

Warden v. Hayden (1967), 387 U.S. 294, 306-07, 87 S. Ct. 1642, 1650 (emphasis added). In Hayden, police officers in hot pursuit of an individual suspected of armed robbery, followed the subject into his home and arrested him. Then, in the course of a search of his home for other persons or weapons, came upon the incriminating evidence, i.e., clothes which matched the description of those worn by the perpetrator. Although the clothes were not readily indentifiable as fruits of the crime, the police ". . . could reasonably believe that the items would aid in the

identification of the culprit." ID. As such, "a nexus . . . between the item to be seized and criminal behavior" could reasonably be inferred. See also Harris v. United States (1968), 390 U.S. 234, 88 S. Ct. 992; Ker v. California, supra at 35-37, 83 S. Ct. 1623, 1630-31.

This explanation of the plain view doctrine was refined in Coolidge v. New Hampshire (1971), 403 U.S. 443, 91 S. Ct. 2022, where the Supreme Court noted that while the doctrine is a recognized "exigent circumstance" dispensing with the requirement of an antecedent arrant, it is critical for courts to bear in mind that any evidence, at the time of seizure, will be in "plain view." The problem with the doctrine has been " . . . to identify the cir-

cumstances in which plain view has legal significance rather than being the normal concomitant of any search, legal or illegal." Id. at 464-65, 91 S. Ct. at 2037. In describing this exception, then, the Coolidge Court observed that the plain view doctrine represents an extension of an officer's right to seize contraband where there is a prior justification for the initial intrusion, i.e., a warrant for another item, "hot pursuit," search incident to a lawful arrest, etc., and where the discovery is "inadvertent," but was careful to caution that:

> ...(T)he extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

Id. at 466, 91 S. Ct. at 2038 (emphasis added). See also Payton v. New York (1980), 445 U.S. 573, 100 S. Ct. 1371; Michigan v. Tyler (1978), 436 U.S. 499, 98 S. Ct. 1942; Andresen v. Maryland (1976), 427 U.S. 463, 96 S. Ct. 2737. The Coolidge Court, however, did not expand on the requisite element that the incriminating nature of the evidence must be "immediately apparent," although when coupled with the Hayden Court's focus on the "nexus" between the item seized and some criminal conduct, the rule to be deduced would seem to require that a police officer, exercising reasonable caution, must have probable cause to perceive that an offense has been or is being committed, that the observed object is evidence incriminating the accused, and that

this perception must be immediate.

This is precisely the view taken by the several federal circuit Courts of Appeals which have had occasion to interpret and apply the Coolidge language. In United States v. Truitt (6th Cir. 1976), 521 F 2d 1174, the courtupheld the conviction of an individual based upon evidence seized during the warranted search of a third party business premises. In this case, officers were executing a warrant at a gun shop in search of evidence of gambling activities and, during the course of the search, happened upon a sawed-off shotgun bearing a repair tag with the accused's name on it. The shotgun was seized and later found to be non-registered and, hence, an unlawful weapon. In validating the seizure of

this weapon, the Truitt court reasoned that since the primary focus is on the "incriminating" nature of the evidence, the relevant consideration is whether, to a police officer exercising reasonable caution, the evidence may be said to offer proof tending to show guilt of the accused. Absolute certainty that an object is contraband is not necessary, the question concerns the existence of probable cause.

> . . .The inquiry, we think, therefore, is not primarily whether the object is contraband, but whether its discovery under the circumstances would warrant a police officer of reasonable caution in believing that an offense has been or is being committed and that the object is evidence incriminating the accused.

Id. at 1177. In applying this standard to the facts before it, the Truitt

court asserted that while a properly registered sawed-off shotgun is not contraband, its lawful possession, in ordinary experience, is rare indeed; so rare, in fact, that the officers were justified in seizing the weapon in light of the probability that criminal conduct was in the offing. Id. See also Porter v. United States (9th Cir. 1964), 335 F 2d 602, 607, cert. denied, 379 U.S. 983, 85 S. Ct. 695. As such, under the circumstances, the conclusion that the weapon represented incriminating evidence was "immediately apparent."

This view was adopted recently in United States v. Ochs (2d Cir. 1979) (per Friendly, J.), 595 F2d 1247, wherein the court was presented with the warrantless seizure of several

notebooks and bank records found during the course of a search conducted incident to a lawful arrest. While the documents, if viewed independently, did not readily admit to culpability, the court nevertheless validated the seizure on the grounds that, under the circumstances, these records became highly suspicious in light of the incriminating evidence uncovered earlier as a result of the lawful search. The Ochs court did not view the police activities here as extending a general exploratory search from one object to another until something incriminating surfaced; rather, police advanced from incriminating object to incriminating object. Further, and more significant to the instant matter, the court noted:

> Even under the plain view doctrine. . .the incriminating nature of an object is generally deemed "immediately apparent" where police have probable cause to believe it is evidence of crime.

Id. at 1258 (citing Truitt, Supra). Accord, United States v. Wright (8th Cir. 1981), 641 F2d 607; United States v. Roberts (5th Cir. 1980), 619 F 2d 384; United States v. Rodriguez (6th Cir. 1979), 596 F.2d 169; United States v. Patterson (10th Cir. 1971), 447 F2d 424, cert. denied (1972), 404 U.S. 1064, 92 S. Ct. 748. See generally 2 W. LaFave, SEARCH AND SEIZURE, supra, S 9.5 (b).

Consistent with these precepts, and specifically relying upon the language of Coolidge, the Ohio Supreme Court recently reviewed the case of an individual charged with receiving stolen

property in a case superficially similar to the instant cause. In State v. Williams, supra, police officers entered upon the accused's premises for the purpose of executing a search warrant authorizing seizure of a hydraulic jack, a cutting torch and an acetylene tank alleged to have been stolen. As other officers proceeded to search for the equipment described in the warrant, a Detective Tell found the suspect in a garage, which was obviously being used as an auto repair shop, and in which Tell recognized that cars located therein were only partially assembled, that the various parts were the same color as the semi-assembled vehicle and that no paint compressor was visible on the premises. Tell then inquired as to where the

accused had obtained the automobiles, and was told that they have been purchased from a local dealer. Tell then telephoned the dealer and learned that they were sold to the accused in a stripped condition. By this time, the property described in the warrant had been confiscated, but, based upon his observations and inquiries, Tell ordered seizure of the automobiles and the various parts as well, in the belief that they were stolen. At the subsequent hearing on a motion to suppress these items, Tell further testified that continued investigation confirmed his belief that the cars were in fact stolen. Nevertheless, the trial court ordered the evidence suppressed.

In affirming the order of the trial court, the Williams court focused upon

the extent of the officer's knowledge upon initial inspection of the garage area and its contents, and noted that:

> . . .(T)he record fails to reveal a sufficient factual basis upon which Tell could have known, or had probable cause to believe, upon initial inspection of the automobile parts, that appellee was in possession of contraband. Quite to the contrary, the record discloses that it was necessary for Detective Tell to inquire as to where the two vehicles were purchased, and to place a telephone call to the auto salvage yard, before he became suspicious that the unattached body parts may have been stolen.

Id. at 85, 377 N.E. 2d at 1016 (emphasis-added). Since upon the initial inspection of the automobile parts the officer did not know, or have probable cause to believe, that the property was contraband, the doctrine of "plain view" could not be relied upon to validate the warrantless intrusion. We decline to contort the plain view

doctrine so as to justify the seizure here under review, since we would thus be allowing this narrow exception to the warrant requirement to swallow the rule. Although Detective Tell at the time of the search, harbored a generalized suspicion that the Oldsmobile body parts were stolen, his own testimony at the hearing on the motion to supppress indicated that upon mere inspection of these seemingly innocuous items it was not "immediately apparant" that appellee was in possession of property which Tell knew, or had probable cause to believe, was contraband. We therefore conclude that Detective Tell's seizure of the Oldsmobile parts was inconsistent with the thrust of the plain view doctrine.

Id. at 86, 377 N.E.2d at 1016 (Emphasis added). While the court noted that even at the time of seizure this officer harbored no more than a generalized suspicion that the property was criminal in nature, the clear focus is upon the conduct of the officer leading up to the seizure and whether it may be said that the officer had within his knowledge facts from which it could reasonably be inferred that a rational nexus between the items and certain criminal activity, i.e., probable cause, was "immediately apparent." Where this "nexus" presents itself to the officer upon inspection of the premises, this element of the plain view doctrine is satisfied.

Thus, we cannot agree with defendant that Williams stands for the bald

proposition that unless the criminal nature of the items seized is immediately apparent, the doctrine of plain view does not apply. What must be immediately apparent upon inspection of the items, and what was absent in Williams, is a reasonable suspicion amounting to probable cause to believe that contraband or evidence of crime is at hand.

C.

Applying these principles to the instant cause, we note that McGaha testified on redirect examination by the State as follows: Q.One question. Looking at the totality of the vehicles and parts removed therefrom, as you've testified to, right? You're able to identify those parts as parts removed from the vehicles?

A. Correct.

Q. From these observations, you are able to draw on your experience and conclude that this was a chop shop operation; is that correct?

A. That's correct.

(T.p. 58.) Thus, unlike the facts in Williams but similar to those presented in Ochs and Truitt, McGaha was immediately presented with what appeared to him to be a "chop shop", i.e., an establishment where removable parts are "chopped" from stolen vehicles for subsequent resale, thus satisfying the requirement that the officer must be possessed of facts which would lead a

man of reasonable caution to believe that a crime has been or is being committed and that the object is evidence incriminating the accused. Under the circumstances present here, we cannot escape the conclusion that McGaha, authorized to enter the garage area of the premises, inadvertently discovered property which he immediately had probable cause to conclude was contraband or evidence of crime.

We need only note further that McGaha's inspection of the remaining vehicles on the premises does not represent a general exploratory search from one object to another until something incriminating is uncovered. To the contrary, under these facts, the search progressed " . . .from one incriminating object to another, "Ochs,

supra at 1258, and thus did not offend the plain view exception to warrantless searches.

Based upon these reasons, we conclude that the trial court did not err in refusing to suppress the evidence on the ground that the execution of the warrant exceeded its lawsuit scope. The second assignment of error is accordingly overruled.

For the foregoing reasons, the judgement is affirmed.

KEEFE AND DOAN, J. J. CONCUR.

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1. Other instances where an informant's factual basis for his knowledge may be inferred include cases where the affiant has corroborated the allegations of the informant through independent investigation, e.g., United States v. Sporleder (10th Cir. 1980), 635 F.2d 809; United States v. Scott (5th Cir. 1977), 555 F.2d 522;

State v. Karr (1975), 44 Ohio St. 2d 163, 339 N.E.2d 641, or police surveillance, e.g., United States v. Edmond (6th Cir. 1977), 548 F.2d 1256, cert. denied, 433 U. S. 912, 97 S. Ct. 2983; State v. Nabozny (1978), 54 Ohio St. 2d 195, 375 N.E.2d 784, or where several, unrelated informants all supply substantially identical information, e.g., United States v. Diecidue (5th Cir. 1979), 603 F.2d 535, cert. denied sub nom. Gispert v. United States (1980), 445 U.S. 946, 100 S. Ct. 1345; United States v. Hyde (5th Cir. 1978), 574 F.2d 856.

2. Under Spinelli, an informant's credibility may be inferred from a variety of factual allegations set forth in the affidavit, such as an averment that the informant has a prior record of supplying correct information, e.g., United States v. Lauderman (9th Cir. 1978), 576 F.2d 1383, cert. denied, 439 U. S. 896, 99 S. Ct. 257; United States v. Sultan (2d Cir. 1972), 463 F.2d 1066; State v. Dodson (8th Dist. 1974), 43 Ohio App. 2d 31, 332 N.E.2d 371, cert. denied (1975), 423 U.S. 834, 96 S. Ct. 58, or where the affiant gains his information from a fellow police officer or government agent, e.g., United States v. Beausch (9th Cir. 1979), 596 F.2d 871; United States v. Harrick (3d Cir. 1978), 582 F.2d

329; United States v. Emery (1st Cir. 1976), 541 F.2d 887.

3. Than an informant is reliable on a particular occasion may also be inferred under a variety of circumstances, such as where the informant has acquired his information by first-hand observation, e.g., United States v. Venezuela (9th Cir. 1979), 596 F.2d 824, cert. denied sub nom. Lyaragu v. United States, 441 U.S. 965, 99 S. Ct. 2415; United States v. Moore (9th Cir. 1975), 522 F.2d 1068, cert. denied, 423 U.S. 1049, 96 S. Ct. 775, or where the informant is an employee of the victim, e.g., United States v. Wilson (7th Cir. 1973), 479 F.2d 936; United States v. Pascente (7th Cir. 1967), 387 F.2d 923, cert. denied, 390 U.S. 1005, 88 S. Ct. 1248, or an eyewitness to the crime, e.g., United States v. Agapito (2d Cir. 1980), 620 F.2d 324, cert. denied, 101 S. Ct. 107; United States v. Melvin (1st Cir. 1979), 596 F.2d 492, cert. denied, 444 U. S. 837, 100 S. Ct. 73.

A similar inference of reliability may be drawn where the informant makes a statement against his penal interest, e.g., United States v. Davis (D.C. Cir. 1979), 617 F.2d 677; United States v. Rosenbarger (6th Cir. 1976), 536 F.2d 715, cert. denied (1977), 431 U.S. 965, 97 S. Ct. 2920; Armour v. Salisbury

(6th Cir. 1974), 492 F.2d 1032, or where he obtains his information directly from the accused, e.g., United States v. Simmons (D.C. Pa 1978), 444 F. Supp. 500.

4. It may be noted in passing that while such reputation evidence is often forbidden as evidence against an accused at trial, its exclusion is predicated on the grounds that such evidence is deemed unfairly prejudicial to the accused, or tends to mislead or confuse the trier of fact, but not because it may not be probative of the accused's guilt or innocence. Evid. R. 404, 608, 609.

5. We similarly reject the State's contention that where a named private citizen serves as the informant, the standards of Aguilar-Spinelli are inapplicable. This is, quite simply, not the law. Where private citizens serve as informants, courts are willing to infer that they are reliable on a particular occasion because the risk of citizens fabricating stories out of whole cloth is greatly reduced, thus satisfying the veracity requirements of Aguilar. In all events, a private citizen, like any other informant, must nevertheless provide the affiant with factual information sufficient to demonstrate a reasonable basis for his knowledge,

an Aguilar standards which is not to be lightly inferred.

6. It seems almost unnecessary to add that the affidavit here at issue is nevertheless considerably short of ideal, since it suffers from a deficiency all too common to such affidavits, to wit: imprecise language and lack of full disclosure of information obviously available to the affiant. The reflection is inescapable how a moment of care the inception of these cases would save hours or even days of subsequent trial and appellate time and effort.

PLEASE NOTE

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

Baldwin Printing, Publishers, Springfield, Ohio

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19. 82 *TERM*

To wit: March 17, 1982

State of Ohio,
Appellee,
vs.
Edward J. Ball, Jr.,
Appellant.

No. 82-83

MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
for HAMILTON *County*

It is ordered by the Court that this motion is overruled.

YOUR
ATION
NOT FOR FILING

COSTS:

Motion Fee, $20.00, paid by Vicki Ball

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ____ *day of* ____ *19* ____

____ *Clerk*

____ *Deputy*

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 82 TERM

To wit: March 17, 1982

State of Ohio,
Appellee,

vs.

Edward J. Boll, Jr.,
Appellant.

No. 82-83

APPEAL FROM THE COURT OF APPEALS

for HAMILTON County

This cause, here on appeal as of right from the Court of Appeals for HAMILTON County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

FOR YOUR INFORMATION ONLY NOT FOR FILING

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for HAMILTON County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this ____ day of _____ 19____

_____ Clerk

_____ Deputy

STATE OF OHIO
HAMILTON COUNTY SS:

SEARCH WARRANT
HAMILTON COUNTY
MUNICIPAL COURT

To the Sheriff of Hamilton County, Greetings: Whereas, there has been filed with me an affidavit, a copy of which is attached hereto, and incorporated herein, these are, therefore to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the Daytime, into the:

Premises and property located at 8709 Bridgetown Rd. Hamilton County, Ohio

in the county aforesaid, and there diligently search for the goods, chattels, or articles, towit:

A Case 480 Back Hoe Loader Const. King. Yellow in color, or parts thereof

and that you bring the same, or any part thereof, found on such search,

forthwith before me, or some other judge or magistrate of the county having cognizance thereof, to be disposed of and dealt with according to law.

Given under my hand this 10 day of October 1980, at 1352 o'clock.

/S/
Judge, Hamilton
County Municipal Court

RETURN ON SEARCH WARRANT

On the 10 day of Oct, 1980 at 1430 o'clock __M., I executed the search warrant attached hereto, and removed from said premises in the presence of

_____

property of which the following is an inventory: Dent jerker
Assorted boxes (12) hand tools (wrenches)
Torch set
Air compresser
Slam hammer
VW - 1332927289
Ford Trk - F25SNCF4716
Olds - 3R47FAM440038
Datsun - HLS30385252
Red tool set - chest - & assorted tools (Snap On)
Craftsman elect wrench

I hereby certify that copies of the search warrant and inventory were (delivered to/left at) _____

Sworn to, subscribed before me and filed in this Court this _____

By: _____ _____

JUDGE, Hamilton Municipal Court

Affiant